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In the Supreme Court of the United States

BAKER BOTTS, L.L.P., ET AL., PETITIONERS

v.

ASARCO, L.L.C.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING REVERSAL

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QUESTION PRESENTED

Section 327 of the Bankruptcy Code provides that bankruptcy trustees and Chapter 11 debtors in possession may, with a bankruptcy court's approval, employ attorneys or other professionals "to represent or assist [them] in carrying out [their] duties" under the Code. 11 U.S.C. 327(a); see 11 U.S.C. 1107(a). Under 11 U.S.C. 330(a), the court may award an attorney or other professional employed under Section 327 "reasonable compensation for actual, necessary services rendered." 11 U.S.C. 330(a)(1)(A). Compensation awarded under Section 330(a) is treated as an administrative expense and is paid out of the assets of the bankruptcy estate before the claims of most unsecured creditors. 11 U.S.C. 503(b), 507(a). The question presented is as follows:

Whether Section 330(a) authorizes a bankruptcy court to award additional compensation to an attorney for work performed in litigating the attorney's application for compensation under that provision.

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INTEREST OF THE UNITED STATES

The compensation of attorneys and other professionals under 11 U.S.C. 330(a) is an issue of substantial importance to the United States. The Attorney General appoints United States Trustees to supervise the administration of bankruptcy cases and trustees throughout the country. 28 U.S.C. 581-589a. United States Trustees "may raise and may appear and be heard on any issue in any case or proceeding under" the Bankruptcy Code. 11 U.S.C. 307. United States Trustees are also authorized to review, comment on, and object to applications for compensation under Section 330(a) in accordance with guidelines promulgated by the Executive Office for United States Trustees. 28 U.S.C. 586(a)(3)(A); see 28 C.F.R. Pt. 58, App. A; 78 Fed. Reg. 36,248-36,276 (June 17, 2013). In

fiscal year 2013, United States Trustees filed nearly 700 objections to Section 330(a) fee applications.[1] The United States thus has a substantial interest in the proper interpretation and application of Section 330(a).

STATEMENT

1. This case concerns the interpretation of Section 330(a) of the Bankruptcy Code, which authorizes a bankruptcy court to award certain attorneys and other professionals reasonable compensation to be paid from the assets of the bankruptcy estate.

a. A debtor commences a voluntary bankruptcy case by filing a petition in bankruptcy court. 11 U.S.C. 301(a). The filing of the petition creates a bankruptcy estate generally comprising "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. 541(a)(1). In a Chapter 7 liquidation, the estate is placed under the control of a trustee appointed by the United States Trustee or elected by creditors. 11 U.S.C. 701-703. In most Chapter 11 reorganizations, no trustee is appointed and the debtor—known as the "debtor in possession"—administers the estate as a fiduciary for the estate's creditors. 11 U.S.C. 1101, 1107(a); see *Commodity Futures Trading Comm'n* v. *Weintraub*, 471 U.S. 343, 355-356 (1985). In debt-adjustment cases filed under Chapters 12 and 13, the debtor retains possession of the estate assets, but the bankruptcy process is overseen by an appointed trustee. 1 *Collier on Bankruptcy* ¶¶ 1.07[4]-[5], at 1-42 to 1-43

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[1] U.S. Dep't of Justice, *United States Trustee Program Annual Report, FY 2013*, at 27, http://www.justice.gov/ust/eo/public_affairs/ annualreport/docs/ar2013.pdf (last visited Dec. 9, 2014).

(Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2014) (*Collier*).

With the bankruptcy court's approval, a trustee may employ attorneys or other professionals to "represent or assist the trustee in carrying out the trustee's duties" under the Code. 11 U.S.C. 327(a); see *Lamie* v. *United States Tr.*, 540 U.S. 526, 531 (2004). A Chapter 11 debtor in possession has the same authority to retain professionals to assist in the reorganization process. 11 U.S.C. 1107(a). In addition to attorneys, the professionals employed under Section 327 include accountants, auditors, investment bankers, and management consultants. See Stephen J. Lubben, *Chapter 11 Professional Fee Study* 32 (Am. Bankr. Inst. 2007) (*Professional Fee Study*).

b. Unless the bankruptcy court approves the terms and conditions of employment in advance, the compensation of a professional employed under Section 327 is governed by 11 U.S.C. 330(a).[2] Section 330(a) also governs compensation for certain other persons, including professionals employed by Chapter 11 creditor committees and attorneys representing individual debtors in Chapter 12 and 13 cases. See 11 U.S.C. 330(a)(1) and (4)(B), 1103; *Lamie*, 540 U.S. at 540-541.

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[2] Under 11 U.S.C. 328(a), a court may approve in advance "reasonable terms and conditions of employment" for a professional. A compensation arrangement approved under Section 328(a) cannot be altered after the employment is concluded unless it proves "improvident in light of developments not capable of being anticipated." 11 U.S.C. 328(a). Section 328(a) thus "provides a mechanism to cement definite compensation terms at the beginning of a professional's engagement." 3 *Collier* ¶ 328.02, at 328-7.

Under Section 330(a), "the court may award * * * reasonable compensation for actual, necessary services rendered" by a professional, as well as "reimbursement for actual, necessary expenses." 11 U.S.C. 330(a)(1). Compensation awarded under Section 330(a) is treated as an administrative expense and is paid out of the assets of the bankruptcy estate before the claims of most unsecured creditors. 11 U.S.C. 503(b), 507(a); see *Law* v. *Siegel*, 134 S. Ct. 1188, 1195 (2014). When, as is typical, the estate's assets are insufficient to fund a complete repayment for creditors, "every dollar paid" in Section 330(a) professional fees "detracts from the unsecured creditors' recovery." Pet. App. 16a-17a.

An attorney or other professional seeking compensation under Section 330(a) must submit a detailed fee application to the bankruptcy court. Fed. R. Bankr. P. 2016(a). Creditors and other parties in interest, as well as the United States Trustee, must be notified of the application and may file objections. 11 U.S.C. 330(a)(1) and (2); 28 U.S.C. 586(a)(3)(A). In addition, "bankruptcy courts have an independent duty to review fee applications even absent objections," *In re Busy Beaver Bldg. Ctrs., Inc.*, 19 F.3d 833, 843 (3d Cir. 1994), and may *sua sponte* deny an application or award reduced compensation, 11 U.S.C. 330(a)(2); see 3 *Collier* ¶ 330.08[2][b][vi], at 330-69. Those safeguards are necessary in part because debtors and other parties in interest often will lack adequate financial incentives to monitor the reasonableness of fees that will be paid from the estate. See *Busy Beaver Bldg. Ctrs.*, 19 F.3d at 842-843.

c. Section 330(a)'s provisions governing the determination of reasonable compensation seek to au-

thorize fees sufficient to attract the services of talented professionals, while also protecting creditors from excessive or unreasonable fee requests.

Before the Bankruptcy Code was enacted in 1978, courts awarded bankruptcy professionals fees that were "at the lower end of the spectrum of reasonableness," on the theory that the professionals were acting "as officers of the court" and therefore "should not expect to be compensated as generously for their services as they might be were they privately employed." *In re First Colonial Corp. of Am.*, 544 F.2d 1291, 1299 (5th Cir.) (citation omitted), cert. denied, 431 U.S. 904 (1977). Section 330(a) reflects a deliberate departure from that approach. Congress determined that "the gain to the estate of employing able, experienced, expert counsel would outweigh the expense to the estate of doing so," and that "unless the estate paid competitive sums it could not retain such counsel on a regular basis." *Busy Beaver Bldg. Ctrs.*, 19 F.3d at 850; see H.R. Rep. No. 595, 95th Cong., 1st Sess. 329-330 (1977); 3 *Collier* ¶ 330.03[3], at 330-29.

Under the current version of the Bankruptcy Code, "the amount of reasonable compensation" awarded for services rendered by an attorney or other professional must be determined based on "the nature, the extent, and the value of such services, taking into account all relevant factors." 11 U.S.C. 330(a)(3). The statute identifies six non-exclusive considerations, including "the time spent on such services," "the rates charged for such services," and "whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title." 11 U.S.C.

330(a)(3)(A), (B) and (F).[3] That inquiry seeks to ensure that the compensation available to a professional employed by a bankruptcy trustee or debtor in possession is reasonable in comparison "to the market measured both by the [professional's] own billing practices * * * and by those of other comparable professionals." 78 Fed. Reg. at 36,249; see 3 *Collier* ¶ 330.03[3], at 330-29.

Congress also sought to protect creditors from excessive or unreasonable fee requests by limiting the services for which compensation may be sought. Section 330(a) permits compensation only for "actual, necessary services rendered." 11 U.S.C. 330(a)(1)(A). It further provides that, to be compensable, services must have been either "reasonably likely to benefit the debtor's estate" or "necessary to the administration of the case." 11 U.S.C. 330(a)(4)(A)(ii). And it prohibits compensation for any "unnecessary duplication of services." 11 U.S.C. 330(a)(4)(A)(i).

Finally, a court determining the amount of compensation available for particular work must consider "whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed." 11 U.S.C. 330(a)(3)(D). Congress specifically addressed the rates to be paid for the preparation of a fee application, directing that "[a]ny

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[3] In 2005, Congress amended Section 330(a)(3) by adding an additional factor and redesignating paragraph (E) as paragraph (F). Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 415, 119 Stat. 107. Although this case is governed by the prior version of the statute, see Pet. App. 87a n.24, this brief will cite the current version because the amendment is not relevant to the question presented.

compensation awarded" for that task must be "based on the level and skill reasonably required to prepare the application," rather than on the level of skill required for the professional's underlying services. 11 U.S.C. 330(a)(6).

2. Respondent is a copper mining, smelting, and refining company. Pet. App. 2a. In 2005, facing "cash flow deficiencies, various environmental liabilities, and tax and labor problems," it filed a Chapter 11 reorganization petition. *Ibid.* At the outset of the process, respondent's prospects for a successful reorganization appeared dim, and its creditors "were expected to receive cents on the dollar." *Id.* at 63a; see *id.* at 62a.

Respondent sought and obtained the bankruptcy court's approval to employ petitioners to provide legal representation during the reorganization. Pet. App. 26a-27a, 153a. *Inter alia*, petitioners successfully prosecuted fraudulent-transfer claims against respondent's parent company, ultimately securing for the estate a judgment "valued at between $7 and $10 billion." *Id.* at 3a. That award was apparently "the largest fraudulent transfer judgment in Chapter 11 history." *Ibid.*

In combination with other factors, the fraudulent-transfer recovery contributed significantly to a successful reorganization in which all of respondent's creditors were paid in full. Pet. App. 3a, 24a. In 2009, respondent emerged from Chapter 11 as a healthy company "with little debt, $1.4 billion in cash, and the successful resolution of its environmental" and other liabilities. *Id.* at 3a. Respondent's parent then reassumed control over the company. *Ibid.*

3. Petitioners sought compensation under Section 330(a). After extensive proceedings in the bankruptcy

and district courts, petitioners were awarded approximately $129 million in fees. Pet. App. 3a-4a.[4]

a. Petitioners requested approximately $120 million in compensation for their "core" work on the bankruptcy case, a 20% enhancement of those core fees, and compensation for time spent preparing their fee applications and litigating fee issues. Pet. App. 3a. Respondent raised numerous objections to petitioners' fee applications and sought extensive discovery. *Ibid.* The United States Trustee objected to petitioners' requested fee enhancement, but did not object to the other aspects of their fee applications. *Id.* at 58a-59a.

After a six-day trial, the bankruptcy court rejected respondent's challenges to petitioners' core fee requests and awarded approximately $120 million in core fees. Pet. App. 3a; see *id.* at 86a-130a. The court also determined that petitioners were entitled to a 20% enhancement of their fees for work on the fraudulent-transfer action (but not, as petitioners had originally sought, for all of their work in the case). *Id.* at 3a, 130a-135a. That enhancement yielded an additional award of roughly $4.2 million. *Id.* at 135a.

The bankruptcy court granted in part petitioners' requests for compensation for time spent preparing their fee applications and litigating fee issues. Petitioners had sought more than $8 million in compensation for fee-related work. Pet. App. 57a. Although the

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[4] Petitioners filed separate fee applications, and the lower courts' treatment of those applications differed in certain respects not relevant to the question presented. For simplicity, this brief refers to petitioners' applications collectively and cites the bankruptcy and district court opinions addressing the application filed by petitioner Baker Botts L.L.P., which sought and received the vast majority of the total fee award.

court held that Section 330(a) permits the award of compensation for the preparation and successful defense of a fee application, it concluded that the fees petitioners sought for that work were "higher than were reasonable or necessary" under the circumstances. *Id.* at 142a; see *id.* at 135a-143a. The court therefore reduced the fee-related portion of petitioners' award to approximately $5 million. *Id.* at 4a, 142a.

b. The district court affirmed in part, reversed in part, and remanded. Pet. App. 22a-54a. As relevant here, respondent dropped its challenges to petitioners' core fees and disputed only the enhancement and the award for petitioners' preparation and defense of their fee applications. *Id.* at 4a, 28a-29a.

The district court affirmed the enhancement. Pet. App. 35a-45a. The court further held that Section 330(a) generally permits compensation for the successful defense of a fee application. *Id.* at 45a-46a. The court agreed with the United States Trustee, however, that a professional is not entitled to compensation for time spent seeking an enhancement to its core fees. *Id.* at 28a-29a, 48a-49a. The court also held that petitioners should not be compensated for any work done to correct deficiencies in their original fee applications. *Id.* at 49a. Because the court could not ascertain whether the bankruptcy court's award included compensation for those non-compensable tasks, it remanded for further proceedings. *Id.* at 50a.

c. On remand, the bankruptcy court reinstated its original award of $5 million, explaining that no part of that sum was attributable to time spent seeking a fee enhancement or correcting deficiencies in petitioners'

original fee applications. Pet. App. 147a-151a. The district court affirmed. *Id.* at 157a-166a.

4. The court of appeals affirmed the fee enhancement but reversed the award for petitioners' fee defense, holding that "Section 330(a) does not authorize compensation for the costs counsel or professionals bear to defend their fee applications." Pet. App. 14a; see *id.* at 1a-21a.[5] The court relied on 11 U.S.C. 330(a)(4)(A)(ii), which states that professional services are compensable only if they are either "reasonably likely to benefit the debtor's estate" or "necessary to the administration of the case." See Pet. App. 15a. The court held that the defense of a fee application does not satisfy either criterion because "[t]he primary beneficiary of a professional fee application * * * is the professional" rather than the estate. *Ibid.* The court also relied on Section 330(a)(6), which contemplates an award of compensation for "the *preparation* of a fee application," 11 U.S.C. 330(a)(6) (emphasis added), but does not address the *defense* of a fee application. Pet. App. 15a-16a.[6]

The court of appeals acknowledged that, under federal fee-shifting statutes such as 42 U.S.C. 1988, "time spent to prepare, litigate and appeal a fee award is often compensable." Pet. App. 17a. The court explained, however, that fee-shifting statutes reflect a congressional determination that "the losing party should bear the full costs of counsel for the winner."

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[5] Petitioners did not appeal the portion of the district court's decision denying compensation for time spent seeking an enhancement of their core fees. Pet. App. 4a-5a.

[6] In an apparent typographical error, two sentences in the court of appeals' opinion refer to this provision as Section 330(a)(4) rather than Section 330(a)(6). See Pet. App. 16a.

Ibid. The court believed that "the equities are quite different" in the context of Section 330(a), where there is a "limited pool of assets" and "[n]o side wears the black hat." *Ibid.*

Finally, the court of appeals rejected petitioners' arguments that refusing to award defense fees under Section 330(a) would (1) dilute a professional's effective compensation to a level below what a comparably skilled practitioner would earn outside of bankruptcy and (2) invite meritless objections to fee applications. Pet. App. 18a-21a. The court described its approach as preserving "rough comparability" between bankruptcy and nonbankruptcy cases, and it suggested that bankruptcy professionals could recoup the anticipated costs of defending their fee applications by increasing their rates for core services. *Id.* at 18a; see *id.* at 18a n.7. The court also observed that bankruptcy courts should respond to frivolous objections to fee applications by applying "the exception to the American Rule that allows fee shifting where an adverse party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *Id.* at 21a (citing *Chambers* v. *NASCO, Inc.*, 501 U.S. 32, 45-46 (1991)).

SUMMARY OF ARGUMENT

I. Section 330(a) permits an award of compensation for the defense of a fee application when such an award is necessary and appropriate to ensure that a professional receives reasonable compensation for its services in the underlying bankruptcy case.

A. Bankruptcy courts determine awards of compensation under Section 330(a) using the lodestar method, which multiplies the number of hours reasonably expended by a reasonable hourly rate. The result, subject to any appropriate adjustments, by defi-

nition constitutes "reasonable compensation" for a professional's services. To obtain that compensation, however, the professional must file an application with the court and may be required to litigate objections. If a professional reasonably devotes additional time to the successful defense of its fee application but receives no additional compensation for that time, its compensation for services rendered in the underlying bankruptcy case may be effectively diluted to something less than the "reasonable compensation" required by Section 330(a).

Decisions interpreting federal fee-shifting statutes confirm that Section 330(a) permits compensation for the defense of a fee application in appropriate cases. Like Section 330(a), fee-shifting statutes typically do not expressly address fee defense. Nonetheless, courts have held with near unanimity that those statutes permit compensation for time reasonably spent successfully defending a fee application because the denial of such compensation would effectively dilute the fees awarded for work done on the merits of the case. Like Section 330(a), fee-shifting statutes provide for awards of "reasonable" compensation and seek to ensure remuneration comparable to what a professional would receive for performing equivalent work for a paying client. The fee-shifting precedents thus provide highly instructive guidance on the proper interpretation of Section 330(a).

Section 330(a)(6) further confirms that fee defense is compensable in appropriate cases by specifically addressing the amount of compensation available for the *preparation* of a fee application. Because Section 330(a)(6) does not itself authorize compensation for that task, it indicates that such authorization is in-

cluded in Section 330(a)(1)'s general provision for an award of "reasonable compensation." And if Section 330(a)(1) permits compensation for time spent *preparing* a fee application, there is no apparent reason to conclude that it categorically bars compensation for time spent *defending* the same application.

B. The contrary arguments advanced by respondent and the court of appeals lack merit. The court of appeals correctly held that the defense of a fee application is not *itself* a compensable service within the meaning of Section 330(a). It does not follow, however, that a professional should never be paid for the defense of its fee application. Instead, compensation for such work is properly viewed as part of the compensation *for the underlying services* in the bankruptcy case. Respondent is likewise wrong in contending that fee defense is not compensable because professionals are generally required to bear their own costs when litigating fee disputes with clients outside of bankruptcy. Unlike their nonbankruptcy counterparts, professionals seeking compensation under Section 330(a) must obtain court approval before they can be paid, and they potentially face objections to their fee applications from parties other than their clients.

C. Although the court of appeals erred in holding that the defense of a fee application is never compensable, fee-defense work should be compensated only to the extent necessary to preserve the reasonableness of a professional's compensation for core services. Accordingly, as under fee-shifting statutes, compensation should be awarded only if, and to the extent that, the underlying application is approved. Moreover, fees should be awarded only for time *reasonably* spent on fee defense—unnecessary or unreasonable work

and time devoted to curing deficiencies in an original application are not compensable. Finally, because the burden of an award under Section 330(a) ordinarily falls on innocent creditors rather than on the party that instigated the fee dispute, courts should respond to frivolous or abusive fee objections by imposing sanctions on the objecting party rather than by awarding additional compensation under Section 330(a).

II. Although much of petitioners' analysis is consistent with the approach set forth in this brief, petitioners rely on a different interpretation of Section 330(a)'s text. In petitioners' view, work performed in defending a fee application *itself* constitutes "services rendered" under Section 330(a)(1)(A) for which a professional should receive "reasonable compensation." That interpretation is contrary to the most natural reading of the statutory text because the phrase "services rendered" connotes work performed on behalf of a client and does not encompass a professional's effort to secure compensation for itself. Moreover, although petitioners appear to agree that the defense of a fee application is compensable only to the extent it is successful, it is not readily apparent how that limitation could be grounded in the statute if fee defense were itself a compensable service under Section 330(a).

ARGUMENT

The court of appeals erred in holding that Section 330(a) categorically prohibits an award of fees for the defense of a bankruptcy professional's fee application. When a law firm successfully responds to objections asserted against its Section 330(a) fee application, the additional time spent on the fee defense dilutes the firm's compensation and effectively reduces the hour-

ly rate it receives for services rendered in the underlying bankruptcy. In such circumstances, Section 330(a) may authorize an award of fees for work performed in defending the firm's fee application. The most persuasive textual basis for that conclusion is not (as petitioners contend) that the hours spent defending a fee application qualify as independently compensable "services rendered" within the meaning of 11 U.S.C. 330(a)(1)(A). Rather, compensation for fee defense is sometimes necessary and appropriate to ensure that a professional receives "reasonable compensation" for core services rendered in the underlying bankruptcy case. 11 U.S.C. 330(a)(1)(A).[7]

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[7] In the district court, the United States Trustee filed briefs contending, *inter alia*, that Section 330(a) does not authorize an award of fees for time spent pursuing a fee enhancement. See 2:11-cv-290 Docket entry No. (Docket entry No.) 12, at 22-30 (Nov. 23, 2011); Docket entry No. 19, at 14-16 (Jan. 13, 2012). Although the United States Trustee did not challenge the award of fees for petitioners' successful defense of their core fee awards, its briefs stated that Section 330(a) bars compensation for fee defense in all circumstances. *Ibid.* Those statements are inconsistent with guidelines subsequently issued by the Executive Office for United States Trustees, which provide that compensation for fee defense is "generally" inappropriate but recognize a "judicial exception" for time spent "litigating an objection to the application where the applicant substantially prevails." 78 Fed. Reg. at 36,250; see *id.* at 36,269, 36,271. This brief adopts a similar position and reflects the government's considered views on the issue.

I. SECTION 330(a) AUTHORIZES AN AWARD OF FEES FOR THE DEFENSE OF A FEE APPLICATION TO THE EXTENT NECESSARY TO PROVIDE REASONABLE COMPENSATION FOR CORE SERVICES

A. The Categorical Denial Of Defense Fees Would Contravene Section 330(a) By Diluting Compensation For Core Services

1. Section 330(a) provides for the award of "reasonable compensation for actual, necessary services rendered" by attorneys and other professionals. 11 U.S.C. 330(a)(1)(A). In determining the amount of compensation that is "reasonable," courts must "consider the nature, the extent, and the value" of the services, "taking into account all relevant factors," including the time spent, the rates charged, and "whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners" in nonbankruptcy cases. 11 U.S.C. 330(a)(3).

Bankruptcy courts performing that task typically apply the lodestar approach, under which "the number of hours reasonably expended by a professional is multiplied by a reasonable hourly rate to arrive at a reasonable fee," which may in some cases be adjusted further based on additional factors. 2 Hon. William L. Norton, Jr. & William L. Norton III, *Norton Bankruptcy Law and Practice* § 31:5, at 31-12 (3d ed. 2014); see, *e.g.*, *In re Market Ctr. E. Retail Prop., Inc.*, 730 F.3d 1239, 1246-1247 (10th Cir. 2013); *In re Sullivan*, 674 F.3d 65, 68-69 (1st Cir. 2012); *In re Eliapo*, 468 F.3d 592, 598-599 (9th Cir. 2006); Pet. App. 6a-7a. The lodestar approach was developed in the context of fee-shifting statutes. It reflects this Court's judgment that "[t]he most useful starting

point for determining the amount of a reasonable fee is the number of hours reasonably expended * * * multiplied by a reasonable hourly rate." *Hensley* v. *Eckerhart*, 461 U.S. 424, 433 (1983). When the lodestar method is applied to a bankruptcy professional's core services, subject to any appropriate adjustments, the result "by definition will represent the reasonable worth of the services rendered." *Blanchard* v. *Bergeron*, 489 U.S. 87, 96 (1989).

To obtain that compensation, however, an attorney or other bankruptcy professional must submit to the bankruptcy court a detailed fee application. See Fed. R. Bankr. P. 2016(a); see also 28 C.F.R. Pt. 58, App. A (guidelines for Section 330(a) fee applications promulgated by the Executive Office for United States Trustees); 78 Fed. Reg. at 36,251-36,254 (guidelines for applications by attorneys seeking compensation in large Chapter 11 cases). Before fees may be awarded, the parties in interest and the United States Trustee must have an opportunity to review and object to the fee application. See 11 U.S.C. 330(a)(1); 28 U.S.C. 586(a)(3)(A).

Most fee applications are approved without objection. See *In re Busy Beaver Bldg. Ctrs., Inc.*, 19 F.3d 833, 842 (3d Cir. 1994); *Professional Fee Study* 35. In other cases, questions or objections are raised by the parties in interest, the United States Trustee, or the bankruptcy court, but are resolved through the clarification or supplementation of the application or the withdrawal of an unjustified request for payment. See *In re Computer Learning Ctrs., Inc.*, 285 B.R. 191, 223-224 (Bankr. E.D. Va. 2002). Sometimes, however, fee disputes give rise to extensive litigation. See *id.* at 223. An objection to a fee application triggers a "con-

tested matter" under the Federal Rules of Bankruptcy Procedure, which can involve discovery, written briefing, and a hearing or trial. See Fed. R. Bankr. P. 9014; see also Pet. App. 3a (describing extensive discovery and a six-day fee trial).

If a professional reasonably devotes significant time to the successful defense of its fee application but receives no additional compensation, the inevitable result is to "dilute its compensation for 'actual and necessary services'" rendered in the underlying bankruptcy case. *In re Smith*, 317 F.3d 918, 929 (9th Cir. 2002), cert. denied, 538 U.S. 1032 (2003). In the proceedings below, for example, the bankruptcy court determined that petitioners reasonably devoted time worth approximately $5 million to the defense of their fee applications. Pet. App. 4a. The court of appeals acknowledged that, by denying compensation for that time, it was diluting the core fee received by petitioner Baker Botts L.L.P. by roughly 4.4%. *Id.* at 18a-19a. In smaller cases, the costs of a fee defense can be considerably larger in relation to the professional's total fees. See, *e.g.*, *Smith*, 317 F.3d at 922 (defense fees and costs were more than 25% of core fees); *In re Buckridge*, 367 B.R. 191, 206-207 & n.26 (Bankr. C.D. Cal. 2007) (defense fees were approximately 8% of core fees).

The denial of compensation for a successful fee defense thus effectively results in a "reduction of the rate paid for all the attorneys' services" in the underlying proceeding. *In re Nucorp Energy, Inc.*, 764 F.2d 655, 662 (9th Cir. 1985) (*Nucorp*). That dilution of a core fee award contravenes Section 330(a)'s provision for "reasonable compensation" for core services. It also undermines the policies underlying Section

330(a)—and the statute's express direction to consider "the customary compensation charged by comparably skilled [nonbankruptcy] practitioners," 11 U.S.C. 330(a)(3)(F)—by "reduc[ing] the effective compensation of bankruptcy attorneys to levels below the compensation available to attorneys generally." *Smith*, 317 F.3d at 928.

2. Decisions interpreting federal fee-shifting statutes confirm that, in appropriate circumstances, an award of "reasonable" professional fees may include compensation for the successful defense of a fee application. Many federal statutes require the payment of "reasonable" attorney's fees under specified circumstances. See *Pennsylvania* v. *Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 562 (1986). Like Section 330(a), those statutes do not expressly provide for an award of fees for work performed defending a fee application. Nonetheless, courts have held with near-unanimity that "[r]easonable time expended in applying for statutory fees and litigating statutory fee issues is compensable." Alba Conte, *Attorney Fee Awards* § 4:21, at 528 (3d ed. 2004); accord 1 Robert L. Rossi, *Attorneys' Fees* § 6:15, at 6-60 to 6-62 & n.1 (3d ed. 2014) (Rossi).

In *Commissioner, INS* v. *Jean*, 496 U.S. 154 (1990), for example, this Court concluded that fee-defense work is compensable under the Equal Access to Justice Act, 28 U.S.C. 2412(d)(1)(A). See 496 U.S. at 158, 161-166. Courts of appeals have reached the same result in applying numerous other fee-shifting statutes. See, *e.g.*, *Camacho* v. *Bridgeport Fin., Inc.*, 523 F.3d 973, 981 (9th Cir. 2008) (Fair Debt Collection Practices Act, 15 U.S.C. 1692k(a)(3)); *Hernandez* v. *Kalinowski*, 146 F.3d 196, 200 (3d Cir. 1998) (Prison Litigation

Reform Act of 1995, 42 U.S.C. 1997e(d)(1)(A)); *Anderson* v. *Director, Office of Workers Comp. Programs*, 91 F.3d 1322, 1325 (9th Cir. 1996) (Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 928(a)); *American Petroleum Inst.* v. *EPA*, 72 F.3d 907, 918 (D.C. Cir. 1996) (Clean Air Act, 42 U.S.C. 7607(f)); *American Fed'n of Gov't Emps., AFL-CIO, Local 3882* v. *FLRA*, 994 F.2d 20, 21-23 (D.C. Cir. 1993) (Back Pay Act of 1966, 5 U.S.C. 5596); *Cruz* v. *Hauck*, 762 F.2d 1230, 1233-1234 (5th Cir. 1985) (42 U.S.C. 1988); *Gagne* v. *Maher*, 594 F.2d 336, 344 (2d Cir. 1979) (same), aff'd, 448 U.S. 122 (1980); *Lund* v. *Affleck*, 587 F.2d 75, 77 (1st Cir. 1978) (same).

Although these decisions have sometimes relied on features specific to the particular fee-shifting statutes at issue, they have principally applied the anti-dilution rationale described above. In *Jean*, for example, this Court quoted with approval the Second Circuit's observation that "denying attorneys' fees for time spent in obtaining them would dilute the value of a fees award by forcing attorneys into extensive, uncompensated litigation." 496 U.S. at 162 (quoting *Gagne*, 594 F.2d at 344) (internal quotation marks omitted). Other courts have likewise reasoned that "if an attorney is not compensated for the time expended on the fee request, the net effect would be to reduce the attorney's hourly rate for all the hours worked on the case," thereby rendering the underlying award unreasonably low. Rossi § 6:15, at 6-60 to 6-61; see, *e.g.*, *Camacho*, 523 F.3d at 981; *Cruz*, 762 F.2d at 1234; *Lund*, 587 F.2d at 77.[8]

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[8] This Court applied analogous reasoning in holding that fee-shifting statutes permit "an appropriate adjustment" to an attor-

This Court has held that its "case law construing what is a 'reasonable' fee applies uniformly" to all federal fee-shifting statutes using that formulation. *City of Burlington* v. *Dague*, 505 U.S. 557, 562 (1992). And courts of appeals have further concluded that "the general principles applicable under fee-shifting statutes" provide guidance when analogous issues arise under Section 330(a), which likewise calls for an award of "reasonable" compensation. *In re UNR Indus., Inc.*, 986 F.2d 207, 210 (7th Cir. 1993); accord *In re Manoa Fin. Co.*, 853 F.2d 687, 690-691 (9th Cir. 1988). Accordingly, the decisions holding that fees for the successful defense of a fee request are an integral component of "reasonable" compensation under federal fee-shifting statutes confirm that such defense fees should also be available under Section 330(a).

3. Although considerations unique to bankruptcy may provide reason to depart from fee-shifting precedents in resolving other questions arising under Section 330(a), no such considerations apply here. To the contrary, Section 330(a) shares the features of fee-shifting statutes that make awards of defense fees appropriate. In the fee-shifting context, "a reasonable attorney's fee is one that is adequate to attract competent counsel, but that does not produce windfalls to attorneys." *Blum* v. *Stenson*, 465 U.S. 886, 897 (1984) (citation, brackets, ellipsis, and internal quotation marks omitted). The court's task is thus to determine

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ney's hourly rates to account for the fact that payment is delayed until the conclusion of the litigation. *Missouri* v. *Jenkins*, 491 U.S. 274, 284 (1989); see *Perdue* v. *Kenny A.*, 559 U.S. 542, 556 (2010). (The same issue does not arise in bankruptcy cases because professionals may seek periodic interim awards of compensation. See 11 U.S.C. 331.)

an award that "*roughly* approximates the fee that the * * * attorney would have received if he or she had been representing a paying client who was billed by the hour in a comparable case." *Perdue* v. *Kenny A.*, 559 U.S. 542, 551 (2010).

Section 330 "is similar to fee-shifting statutes in the important respect that it is intended to attract competent counsel by awarding reasonable compensation for services rendered." *Manoa Fin. Co.*, 853 F.2d at 691. Like fee-shifting provisions, Section 330(a) seeks to ensure that professionals receive "compensation comparable to what they would receive" from paying clients. *In re Taxman Clothing Co.*, 49 F.3d 310, 313 (7th Cir. 1995); see 11 U.S.C. 330(a)(3)(F). And also like fee-shifting statutes, Section 330(a) reflects an "express directive" that attorneys should receive "reasonable" compensation. *Nucorp*, 764 F.2d at 662. The anti-dilution rationale that courts have applied to fee-shifting statutes thus applies with equal force in the context of Section 330(a).

The court of appeals in this case observed that, unlike awards under fee-shifting statutes, the costs of an award under Section 330(a) are ordinarily borne by unsecured creditors rather than by the losing party in litigation. Pet. App. 17a-18a. The court also emphasized that, in this context, "[n]o side wears the black hat." *Id.* at 17a. But the purpose of fee-shifting statutes is not to punish the losing party in litigation.[9] Instead, it is to provide compensation "sufficient to induce a capable attorney to undertake [a] representa-

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[9] Indeed, this Court has observed that fee awards in civil rights cases are often paid by "state and local taxpayers" rather than "by the individuals responsible for the constitutional or statutory violations on which the judgment is based." *Perdue*, 559 U.S. at 559.

tion." *Perdue*, 559 U.S. at 552; see *Blum*, 465 U.S. at 897. Section 330(a) serves substantially the same function and should be given a similar interpretation.

4. Section 330(a)(6) reinforces the conclusion that compensation for the defense of a fee application is available in appropriate cases. That provision specifies that "[a]ny compensation awarded for the preparation of a fee application shall be based on the level and skill reasonably required to prepare the application." 11 U.S.C. 330(a)(6). That directive necessarily presupposes that compensation for the preparation of a fee application is authorized by Section 330(a)(1)'s provision for an award of "reasonable compensation" for services rendered. Section 330(a)(1) permits such compensation "because the preparation of a fee application is not required for lawyers practicing in areas other than bankruptcy" and demands work beyond "routine billing activities" associated with nonbankruptcy practice. 78 Fed. Reg. at 36,250. Compensation for the additional work required to prepare a fee application is thus necessary to avoid diluting a professional's compensation for core services.

If Section 330(a)(1) permits compensation for the *preparation* of a fee application, there is no apparent reason to conclude that it does not also permit compensation for the *defense* of a fee application. Indeed, this Court squarely rejected an effort to draw an analogous distinction in the context of the Equal Access to Justice Act, finding "no textual or logical argument for treating so differently a party's preparation of a fee application and its ensuing efforts to support that same application." *Jean*, 496 U.S. at 162; accord *Kinney* v. *International Bhd. of Elec. Workers*, 939 F.2d 690, 694 n.4 (9th Cir. 1991) ("There is no difference in

principle between the time spent preparing a fee application and the time spent successfully defending the application in litigation.").

Respondent and the court of appeals have not identified a principled basis on which to distinguish between preparing an application and defending it. Instead, they view Section 330(a)(6) as an independent grant of authority to award compensation for the preparation of a fee application, and they infer from the absence of a specific authorization for defense fees that such fees are unavailable. Pet. App. 15a-16a; Br. in Opp. 20-23. But that interpretation founders on Section 330(a)(6)'s text, which contains no affirmative grant of authority and which differs markedly from the provisions of Section 330(a) authorizing awards. Cf. 11 U.S.C. 330(a)(1) ("the court may award" compensation and expenses); 11 U.S.C. 330(a)(4)(B) ("the court may allow reasonable compensation to the debtor's attorney" in cases under Chapters 12 and 13). Instead, Section 330(a)(6) imposes a *restriction* on "[a]ny compensation awarded for the preparation of a fee application." It is thus "framed not as a conferral of authority but as a limitation of authority that already exists" in Section 330(a)(1). *Setser* v. *United States*, 132 S. Ct. 1463, 1469 (2012).

B. The Arguments Advanced In Favor Of A Complete Ban On Compensation For Fee-Defense Work Lack Merit

1. In holding that defense fees are categorically unavailable, the court of appeals principally relied on its conclusion that the defense of a fee application is not compensable under Section 330(a) because it is neither "reasonably likely to benefit the debtor's estate" nor "necessary to the administration of the

case." 11 U.S.C. 330(a)(4)(A)(ii); see Pet. App. 14a-15a. As explained in Part II, see pp. 31-34, *infra*, the court reached the correct conclusion in holding that the defense of a fee application does not *itself* qualify as an independently compensable service under Section 330(a). It does not follow, however, that a professional should never be paid for work performed in defending its fee application. Instead, compensation for such work is properly viewed as part of the compensation *for the underlying services* in the bankruptcy proceeding. Respondent did not challenge the bankruptcy court's determination that the underlying services at issue here were compensable under the governing statutory criteria. As with fees incurred in preparing a fee application, an award of fees incurred in defending the application may be appropriate and necessary to ensure that petitioners' compensation for those underlying services is "reasonable."[10]

2. Respondent contends (Br. in Opp. 24-25) that Section 330(a)(3)(F)'s directive to consider fees earned

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[10] The D.C. Circuit reached a different conclusion in interpreting the fee-shifting provision of the Independent Counsel Act, 28 U.S.C. 593(f), which in some cases permits the subject of an independent counsel investigation to recover fees incurred "during" the investigation. The D.C. Circuit held that this provision does not authorize an award of fees for "preparing the fee application" because those fees are not incurred "during" the investigation. *In re Olson*, 884 F.2d 1415, 1427 (1989) (per curiam). Acknowledging that the issue was a "close" one, the court rested its decision on the principle that "any waiver of sovereign immunity must be strictly construed," and on legislative history indicating that Congress did not intend fee-related work to be compensable. *Id.* at 1427-1428; see *id.* at 1427 n.19. Neither consideration applies here. And the Independent Counsel Act contains no analogue to 11 U.S.C. 330(a)(6), which presupposes that fees for preparing a fee application *are* available.

for comparable services outside the bankruptcy context supports the denial of awards for fee defense because nonbankruptcy lawyers generally must bear their own costs when they litigate fee disputes with clients. That comparison is inapt. Billings submitted by nonbankruptcy professionals are typically subject to dispute *only* by the clients with whom the professionals have contractual relationships. By contrast, bankruptcy professionals retained by a trustee or debtor in possession must file extensive applications to obtain court approval for their fees, and their applications are subject to objections from numerous parties in interest (including debtors and creditors), the United States Trustee, and the bankruptcy court itself. See 11 U.S.C. 330(a)(1) and (2); Fed. R. Bankr. P. 2016(a); see also *Nucorp*, 764 F.2d at 658-659.

The Fifth Circuit's categorical ban on fees for defense of a fee application thus will not produce equality of treatment between bankruptcy and nonbankruptcy professionals. To the contrary, bankruptcy professionals are for this purpose more similarly situated to lawyers seeking compensation under fee-shifting statutes, whose fee requests are also subject to court approval and objections from adverse parties—and who are typically compensated for time spent successfully litigating fee matters.

C. In Many Cases, Compensation For Fee-Defense Work Will Not Be Necessary To Preserve The Reasonableness Of A Professional's Compensation For Core Services

For the reasons stated above, the court of appeals erred in holding that fee-defense work is *never* compensable under Section 330(a). Such awards, however, are not *always* available. Rather, Section 330(a) and

decisions interpreting fee-shifting statutes establish important limitations that will often bar compensation for fee defense. The basic principle behind those limitations is that fee-defense work should be compensated only to the extent necessary to preserve the reasonableness of a professional's compensation for core services. Section 330(a) seeks to ensure that professionals have adequate incentives to perform core services in bankruptcy proceedings. Congress did not intend, however, to encourage fee litigation for its own sake or to make such litigation an independent source of profitable work for lawyers.

1. Most fundamentally, fees for defending a fee application should be awarded only if, and to the extent that, the application is approved. If the bankruptcy court rejects proffered objections and approves the fee application, additional fees for defending the application may be necessary to ensure that the professional receives reasonable compensation for its core services. But if the court concludes that the objections to the fee application have merit—*i.e.*, that the underlying services are wholly or partially non-compensable—that anti-dilution rationale does not apply.

Consistent with that principle, courts that permit compensation of fee-defense work under Section 330(a) have generally held that compensation is available only when a professional "*successfully* defend[s] its fee awards." *Smith*, 317 F.3d at 929; see, *e.g.*, *Manoa Fin. Co.*, 853 F.2d at 691. For the same reason, when a professional is only partially successful in responding to objections asserted against a request for fees, fees should not be awarded for any aspects of the fee-application defense that did not ultimately

succeed. See, *e.g.*, *In re Big Rivers Elec. Corp.*, 252 B.R. 670, 674-676 (W.D. Ky. 2000) (denying fees for "unsuccessfully defending [a] portion of [a] fee award"); *In re Quigley Co.*, 500 B.R. 347, 370-371 (Bankr. S.D.N.Y. 2013) (reducing defense fees in light of partial disallowance of core fees originally sought).

That approach is well-grounded in decisions interpreting fee-shifting statutes. In *Jean*, this Court directed that "fees for fee litigation should be excluded to the extent that the applicant ultimately fails to prevail in such litigation." 496 U.S. at 163 n.10. By way of example, the Court explained that, "if [a] challenge to a requested rate for paralegal time resulted in the court's recalculating and reducing the award for paralegal time from the requested amount, then the applicant should not receive fees for the time spent defending the higher rate." *Ibid.*; see, *e.g.*, *Thompson* v. *Gomez*, 45 F.3d 1365, 1367-1368 (9th Cir. 1995).

Limiting compensation to the successful defense of fee applications also furthers "the large objectives" of Section 330(a), a consideration on which this Court has often relied in "limit[ing] courts' discretion to award fees despite the absence of express legislative restrictions." *Martin* v. *Franklin Capital Corp.*, 546 U.S. 132, 139-140 (2005). Awarding fees for the successful defense of a fee application protects professionals' core fees from unreasonable dilution. At the same time, denying compensation for the unsuccessful defense of a fee application discourages unjustified fee requests and encourages settlement of fee disputes. If, in contrast, defense fees were available even for unsuccessful fee claims, professionals "would have every incentive to feather their nests" through exorbitant fee requests and excessive fee litigation, and

creditors and United States Trustees would be discouraged from raising "legitimate objections to improper billing entries." *Thompson*, 45 F.3d at 1368; see *In re Wind N' Wave*, 509 F.3d 938, 943-944 (9th Cir. 2007) ("compensating unsuccessful litigation over fee applications might lead to frivolous fee requests").

2. Even when a fee applicant ultimately succeeds in defending its fee application, compensation should not be awarded to the extent that the amounts requested for fee defense reflect excessive rates or hours, unnecessary work, or other unreasonable practices. In this case, for example, the bankruptcy court reduced petitioners' award because the defense fees petitioners originally sought were "higher than were reasonable or necessary" to defend their fee applications. Pet. App. 142a. That analysis was consistent with decisions interpreting fee-shifting statutes, which permit compensation only for time "*reasonably* spent" in establishing a right to a fee award. *Gagne*, 594 F.2d at 344 (emphasis added); see *Jean*, 496 U.S. at 163 ("Exorbitant, unfounded, or procedurally defective fee applications * * * are matters that the district court can recognize and discount.").

In addition, a professional should not receive compensation for time spent curing deficiencies or omissions in its original application. Professionals are required to maintain accurate time records and to justify their requests for fees. See Fed. R. Bankr. P 2016(a); 3 *Collier* ¶¶ 330.03[5]-[6], at 330-30 to 330-33. Accordingly, a professional's core fee award is not improperly diluted by the denial of compensation for time spent responding to requests for clarification or additional information made by the court or by the

United States Trustee.[11] And, as the district court recognized in this case, a professional also should not be paid for time spent in litigation to correct "insufficiently described" or "otherwise deficient" aspects of its original fee request. Pet. App. 49a; accord *Quigley Co.*, 500 B.R. at 370-371.

3. If a court determines that compensation for fee-defense work is necessary to provide reasonable compensation in a case where the objections to a professional's fee application were frivolous or otherwise abusive, it should ordinarily consider whether its authority to sanction improper litigation practices provides a more appropriate source for an award of fees. This case is unusual because respondent's creditors were paid in full and the cost of any award of defense fees under Section 330(a) will fall on respondent, the same party that instigated the litigation giving rise to the bankruptcy court's fee-defense award. In a more typical case, the burden of a Section 330(a) award for fee defense will fall on unsecured creditors, most or all of whom may have had no involvement in raising the objections that gave rise to the fee litigation.

When such objections are frivolous, brought in bad faith, or abusively litigated, a bankruptcy court may require the objecting party to pay attorney's fees under Federal Rule of Bankruptcy Procedure 9011(c)(2), or under the court's inherent power to impose sanctions where a litigant has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *Cham-*

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[11] In addition, responding to such inquiries will often be analogous to "reviewing a bill with a client, answering the client's questions and addressing the client's concerns"—routine activities that are not billed to clients outside the bankruptcy context. *Computer Learning Ctrs.*, 285 B.R. at 223.

bers v. *NASCO, Inc.*, 501 U.S. 32, 45-46 (1991) (citations omitted); see Pet. App. 21a. Such sanctions place the burden of defense fees on the responsible party rather than on innocent creditors. Accordingly, if a bankruptcy court concludes that a fee objection is sanctionable under *Chambers* or Rule 9011(c)(2), it would likely be an abuse of discretion to award fees under Section 330(a) instead.

II. WORK PERFORMED DEFENDING A FEE APPLICATION DOES NOT CONSTITUTE INDEPENDENTLY COMPENSABLE "SERVICES RENDERED" UNDER SECTION 330(a)

Much of petitioners' analysis is consistent with the argument outlined in Part I. While petitioners do not address all of the limitations on a court's authority to award defense fees under Section 330(a), they appear to agree that such fees are available only to the extent that the fee application is "successful[]." *E.g.*, Pet. Br. 17, 22. Petitioners also emphasize (Br. 23) that "[a] statutory grant of authority to award reasonable attorneys' fees necessarily includes discretion to award defense fees to avoid dilution of the core fees previously earned."

Petitioners' textual basis for preventing such dilution, however, differs from the analysis set forth above. In the government's view, Section 330(a)(1)(A)'s reference to compensable "services rendered" is limited to work performed in the underlying bankruptcy case. The justification for awarding additional fees for fee-defense work is that such fees are sometimes necessary and appropriate to ensure that the professional's compensation for the *underlying* services is "reasonable." In petitioners' view, by contrast, work performed in successfully defending a fee

application *itself* constitutes "services rendered" for which the professional should receive "reasonable compensation" under Section 330(a)(1)(A). See Pet. Br. 23-30. That interpretation should be rejected because it is contrary to the most natural reading of the statutory text and could produce anomalous practical results.

A. Section 330(a)(1)(A) authorizes awards of compensation for "services rendered" by an attorney or other professional. When used in this context, the term "service" ordinarily refers to "labor performed for another." *Webster's New International Dictionary of the English Language* 2288 (2d ed. 1934). Accordingly, in construing Section 330(a)'s predecessor provision under the Bankruptcy Act, ch. 541, 30 Stat. 544, this Court concluded that the equivalent phrase "'reasonable compensation for services rendered' necessarily implies loyal and disinterested service in the interest of" a professional's client. *Woods* v. *City Nat'l Bank & Trust Co.*, 312 U.S. 262, 268 (1941); accord *American United Mut. Life Ins. Co.* v. *City of Avon Park*, 311 U.S. 138, 148 (1940). Time spent by a professional preparing and defending its fee application is not naturally characterized as "labor performed for another" or as "disinterested service in the interests of" the professional's client. To the contrary, it is work that the professional does on its own behalf.

B. Petitioners' reading of the statute could also produce anomalous practical results. Petitioners correctly recognize that compensation may be awarded only for the *successful* defense of a fee application. But if fee-defense work is viewed as independently compensable "services rendered," it is not readily apparent why fees for such work would be limited to

cases in which the fee defense succeeds. On petitioners' theory, an unsuccessful defense of a fee application could qualify as a service "necessary to the administration of the case," 11 U.S.C. 330(a)(4)(A)(ii)(II), because even an unsuccessful defense "serves to accurately determine the amount of reasonable compensation owed by the estate," Pet. Br. 25.[12]

C. No such textual or practical difficulties arise if fees for defending a fee application are viewed as a means of ensuring that professionals receive "reasonable compensation" for "services rendered" in the underlying bankruptcy case. When a professional's defense of its fee application is successful, the court will by definition have found that those underlying services satisfy Section 330(a)'s prerequisites to compensation. Treating additional fees for time spent defending the fee application as a component of "reasonable compensation" for those underlying services furthers the anti-dilution purpose that petitioners correctly

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[12] The generally accepted rule is that, for purposes of Section 330(a)(4)(A)(ii), the necessity and likely benefit of particular services should be measured "from the perspective of the time that the services were rendered, rather than based on hindsight after the services ha[ve] been performed." 3 *Collier* ¶ 330.03[1][b][iii], at 330-25 (footnote omitted); see *Smith*, 317 F.3d at 926; *In re Top Grade Sausage, Inc.*, 227 F.3d 123, 132 (3d Cir. 2000); *In re Ames Dep't Stores, Inc.*, 76 F.3d 66, 71 (2d Cir. 1996). But cf. *In re Woerner*, 758 F.3d 693, 703 (5th Cir. 2014) (Prado, J., specially concurring) (criticizing the Fifth Circuit's contrary rule and urging the court to grant rehearing en banc to overrule it), reh'g en banc granted, No. 13-50075, 2014 WL 5786536 (Nov. 5, 2014). If fee-defense work were treated as potentially compensable "services rendered," that approach would suggest that at least some unsuccessful defenses could be compensable, on the theory that the professional's defense of its fee application was reasonable at the time it was undertaken even though it did not ultimately succeed.

emphasize, without adopting an unnaturally broad reading of the term "services" in Section 330(a)(1)(A) as encompassing work that professionals perform on their own behalf. And because a bankruptcy court's partial or complete *rejection* of a fee application reflects a determination that the relevant underlying services are *not* compensable (*i.e.*, that the "reasonable compensation" for those services is zero) or that the compensation originally sought was excessive, that rationale also ensures that fees are not awarded for unsuccessful fee-defense work.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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